(4)

No. 03-814

Supreme Court, U.S.
JAN 19 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

WILLARD STEWART,

Petitioner,

v.

DUTRA CONSTRUCTION CO.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION

DAVID B. KAPLAN
Counsel of Record
THOMAS M. BOND
THE KAPLAN/BOND GROUP
Boston Fish Pier
West Building, Suite 304
Boston, MA 02210
(617) 261-0080

Counsel for Petitioner

January 19, 2004

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

STATEMENT OF THE CASE

The respondent seeks to substitute its own version of the facts of this case for the facts actually found by the lower court. To illustrate, the lower court found that "the SUPER SCOOP typically moves once every two hours, covering a distance of thirty to fifty feet." *See* Petitioner's Petition for Writ of Certiorari, App. 17. Conversely, the respondent alleges "the total distance moved in a twenty-four hour period is thirty to fifty feet." *See* Respondent's Brief in Opposition, p. 1, 2. In fact, the Respondent even contradicts its previous position at the Summary Judgment hearing: at that hearing, counsel for the Respondent stated that the SUPER SCOOP moved "about thirty feet at times, about six times per day." App. 41, 51.

In addition to misstating the facts, the Respondent also alleges so-called "facts" in its "Statement of the Case" that are not contained in the record, and were never introduced in evidence at the summary judgment hearing. For example, the lower court found that the SUPER SCOOP had navigation lights, and was required to register and comply with safety regulations issued by the Coast Guard. App. 17. In its opposition, the Respondent alleges for the first time during the entire history of the present case that the lights were not related to navigation. *See* Respondent's Brief, p. 1. This Court should consider the facts contained in the record, not the facts as the Respondent would like them to be.

I. THE FIRST CIRCUIT'S APPROACH TO DETERMINING "VESSEL" STATUS UNDER THE JONES ACT HAS NOT BEEN "WIDELY FOLLOWED"

The First Circuit's current test for vessel status enunciated in *DiGiovanni v. Traylor Bros., Inc.*, 959 F.2d 1119 (CA 1)(en banc), cert. denied, 506 U.S. 827 (1992) has created an eight-circuit conflict. *See* Petitioner's Petition for Certiorari, pp. 8-17. The string of cases cited by the Respondent as "citing *DiGiovanni* with approval" are distinguishable. Respondent's Brief at p. 3. One case in the respondent's string, *Chandris v. Latsis*, 515 U.S. 347, 373 (1995) cited *DiGiovanni* only for the proposition that a vessel retains its "vessel" status even while at anchor, berthed, or dockside. The *Chandris* Court never "approved" the *DiGiovanni* test for vessel status, either explicitly or implicitly. *Chandris* clarified the type of relationship that a seaman must have to a vessel; it never addressed the vessel status requirement under the Jones Act. Another case in the respondent's string of cases which the respondent alleges as "citing *DiGiovanni* with approval" actually does the opposite: it cites Chief Judge Torruella's vigorous dissenting opinion with approval. *Leggett v. Sovran Leasing Corp.*, 909 S.W. 2d 664, 665-67 (No. 1995)(holding a barge to be a "vessel," citing the Appendix containing 22 statutory definitions of "vessel," which was referenced in the *DiGiovanni dissenting opinion*).

II. THE FIRST CIRCUIT'S DECISIONS IN *DIGIOVANNI* AND *STEWART* CONFLICT WITH THIS COURT'S DECISIONS

The Respondent states that there is no conflict between cases interpreting the Jones Act and those interpreting the LHWCA because "vessel status is a non-issue

for those seeking coverage under the LHWCA." Respondent's Brief at p. 4. However, the Respondent ignores the plain language of the LHWCA allowing recovery in tort to maritime workers only for *vessel negligence*. 33 U.S.C. Sec. 905(b). The existence of a "vessel" is a necessary prerequisite for a claim for "vessel negligence" under the LHWCA. The existence of a "vessel" is also an essential element in a Jones Act claim. This Court has held on four occasions that the definition of a Jones Act "seaman" is a "master or member of a crew of any vessel" who is excluded from LHWCA coverage: "It is odd but true that the key requirement for Jones Act coverage now appears in another statute." *McDermott International, Inc. v. Wilander*, 498 U.S. 337 (1991). It follows that the term "vessel" should have the same meaning under the Jones Act and the LHWCA. Yet, the lower court found that the SUPER SCOOP was an LHWCA vessel but not a Jones Act vessel. Permitting inconsistent meanings of the term "vessel" undermines the mutual exclusivity of the two statutes and brings a fundamental incoherence to this Court's delineation of seaman status.

Not only is the Petitioner asking this Court to grant *certiorari* to reconcile the meaning of the term "vessel" in two mutually exclusive and interrelated statutes, i.e., the Jones Act and the LHWCA; a more fundamental problem is the different meaning given to the term "vessel" by the various courts under the same statute, the Jones Act. This has led to inconsistent results based upon indistinguishable facts.

A. Intervention by this Court will Alleviate Differences Between the Lower Courts

The Respondent argues that this Court should not announce one uniform standard for Jones Act vessel status because "the circuits are likely to arrive at different results even if forced to follow the same rule." *See* Respondent's Brief at p. 11. But this Court has recently reaffirmed "the constitutionally based principle that federal admiralty law should be a system of law coextensive with, and operating uniformly in, the whole country." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 25 (1990). Uniformity in federal maritime law is essential for the commerce of this nation. Decisions upholding the uniformity of maritime law use that criterion as the supreme decision maker. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970). The lack of a clear "vessel" standard invites unpredictability. The result in a given maritime case should not hinge on the locus of the incident. Until a standard for Jones Act vessel status is articulated, confusion will prevail, litigation will ensue, and unpredictability will usurp uniformity.

In the present case, when the dredge SUPER SCOOP left its home port at Dutra's construction headquarters in California, it was a Jones Act vessel. It retained its vessel status as it sailed through the Panama Canal, and then up the eastern seaboard. A funny thing happened, though, as it put into Boston Harbor: by dint of judicial fiat, the dredge changed, chameleon-like, from a "vessel" to a "work platform." The group of men aboard her were suddenly converted from seamen to construction workers. And Dutra, the owner of the SUPER SCOOP, was no longer a Jones Act employer upon entering the First Circuit's waters: any insurance it carried covering Jones Act risks was nullified.

A clear and uniform standard for the term "vessel" will allow the lower courts to analyze the different facts of each case using the same test and same criteria, and promote consistent results.

B. A Uniform Standard for Jones Act Vessel Status Should be Developed by This Court, not by Congress

The Respondent argues that any expansion of the Jones Act should be left to Congress. Respondent's Brief at p. 12. The Petitioner is not asking this Court to "expand" the Jones Act to allow new claims under the statute. Rather, the Petitioner is asking this Court to announce one uniform standard for "vessel status," which is a key element under the Jones Act. Since the 1990s, this Court has clarified all of the required elements of seamen status except one: the "vessel status" element. The present case provides this Court with an ideal vehicle to complete the task it began in *Wilander, supra.*

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID B. KAPLAN
Counsel of Record
THOMAS M. BOND
THE KAPLAN/BOND GROUP
Boston Fish Pier
West Building, Suite 304
Boston, MA 02210
(617) 261-0080